

WILLIAM E. TUCKER ET AL.

IBLA 84-490

Decided September 7, 1984

Appeal from decision of Area Manager, Glendale Resource Area, Oregon, Bureau of Land Management, finding no significant impact from proposed mining operations. OR-110-002-84-33.

Dismissed in part, affirmed in part.

1. Mining Claims: Environment -- National Environmental Policy Act of 1969: Environmental Statements

A finding that proposed mining operations will not have a significant impact on the human environment, and that hence no environmental impact statement is required, will be affirmed on appeal where the record establishes that relevant areas of environmental concern have been identified, particularly the effect of excessive stream turbidity due to sediment runoff on fish populations and habitat and local water use, and the determination is the reasonable result of the environmental analysis in light of proposed measures to minimize the environmental impact.

APPEARANCES: William E. Tucker, Richard S. Hinojosa, L. E. Mullarkey, and James L. Nice, pro sese.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

William E. Tucker, Richard S. Hinojosa, L. E. Mullarkey, 1/ and James L. Nice have appealed from a decision of the Area Manager, Glendale Resource Area, Oregon, Bureau of Land Management (BLM), dated March 26, 1984, finding no significant impact from the proposed mining operations of the Bora Bora Mining & Milling Company (Bora Bora) along the Tennessee Gulch within the Tennessee Gulch Nos. 1, 3, 7, and 8 placer mining claims, situated in the E 1/2 W 1/2 sec. 2, T. 33 S., R. 5 W., Willamette Meridian, Douglas County, Oregon.

1/ L. E. Mullarkey filed a notice of appeal but failed to file a statement of reasons. Therefore, pursuant to 43 CFR 4.412(c) and 4.402 the appeal of L. E. Mullarkey is hereby dismissed.

In August 1983, Bora Bora commenced mining operations under a notice of intent filed pursuant to 43 CFR 3809.1-3. On January 12, 1984, Bora Bora filed a plan of operations for approval by BLM of its mining operations pursuant to 43 CFR 3809.1-4. The plan of operations proposed clearing timber and the removal of topsoil and ore, down to bedrock, from a total of 40 acres. The environmental assessment (EA) which BLM prepared to analyze the environmental impact of the proposed mining operations described the proposed mining operations as follows:

Ore is dumped into the feed end of the trommel, mixed with water and washed. Oversize rock exits onto the stacker and is dumped into a temporary holding area. Finer particles, mixed with water, continue along the circuit until the gold is removed. The remainder of the fine tailings (slimes) are pumped into settling ponds, and the water is recycled back into the closed circuit. Processing the black sand concentrates, which contain the gold, involves the use of mercury, alcohol and caustic soda (lye) in a closed circuit.

(EA at 2.) The settling ponds, constructed with log barriers, would be located in mined areas and would be backfilled with slimes and oversize tailings. The areas would be reclaimed using stockpiled topsoil, which would be reseeded and/or reforested. Temporary roads would be constructed between the excavation areas and the production yard.

In its EA, BLM noted that prior mining operations conducted under the notice of intent but without a permit, and dating from August 1983, had resulted in certain environmental impacts, due to excessive sediments deposited in the Tennessee Gulch, which enters Quines Creek. The excessive sediment had eliminated fish and cutthroat trout habitat in a portion of Tennessee Gulch from the operations downstream for approximately one-fourth mile, and had impacted the habitat and salmon spawning area in Quines Creek for an additional distance. BLM estimated the value of the potential anadromous fish population, which was lost as a result of mining operations, at \$40,000, and stated that the impact would remain "for approximately 15 years." In addition, the excessive sediment had adversely affected downstream users of Quines Creek, such as appellants, who used the stream as a flow-through water source for fish ponds and for irrigation and stockwatering purposes.

BLM noted that, under the proposed action, the release of sediments into Tennessee Gulch and Quines Creek "would cease" (EA at 5). Nevertheless, there remains the potential for a "major storm" to overtop or break the earthen dam across the Tennessee Gulch, releasing a "large volume" of fine sediments contained in the pond behind the dam, which would be "destructive to the aquatic ecosystem." Id. In addition, seepage from the production yard and excavation areas "could surface and become overland flow, picking up sediment and depositing it further downstream." Id. Finally, stream crossings "could increase sediment loading to downstream waters." Id. BLM also listed 21 measures to mitigate adverse environmental impacts or enhance the environment.

BLM suggested that runoff from the disturbed areas be directed to certain areas and "not allowed to flow overland to the streams." A minimum 100-foot buffer along Tennessee Gulch, a new stream channel for the Tennessee Gulch in order to avoid the pond and the earthen dam, no stream crossings

with heavy equipment without prior approval and a sand berm constructed adjacent to the production yard "to filter any seepage" leaving the area were also recommended. Id. at 6-7. With respect to settling ponds, BLM suggested that they be constructed "such that the height and width of the retaining berms are adequate to prevent surface flooding" and lined with material to "adequately filter suspended solids and/or toxic wastes to assure that any seepage from the claim into public waters meets or exceeds State or Federal Water Quality Standards." Id. Finally, BLM noted that required State agency permits should be obtained.

In his March 1984 decision, the Acting Area Manager found that [c]ompliance with the stipulations in the approval letter for [Bora Bora's] Plan of Operations (attached) will ensure that water quality standards are met or exceeded. These stipulations, based on the EA's project design features and proposed mitigation, would assure that no significant adverse impacts would occur to the human environment. Monitoring of the operations for compliance by both BLM and DEQ [Department of Environmental Quality for the State of Oregon] should alleviate concern for water quality.

The Acting Area Manager then concluded:

On the basis of the information contained in the EA, all other information available to me and rationale summarized above, it is my determination that the proposed action as described in the EA, in compliance with stipulations identified in the Approval Letter, does not constitute a significant impact affecting the quality of human environment. Therefore, an EIS is unnecessary and will not be prepared.

In the letter approving Bora Bora's plan of operations, the Area Manager included 28 notice, operating and reclamation stipulations which included the 21 proposed mitigating measures noted in the EA. Moreover, the letter provided that the operator

shall comply with all applicable federal, state, and local rules and regulations regarding * * * water quality * * * and shall comply with all requirements of cognizant agencies with jurisdiction on public land. Failure to comply with the requirements of these agencies shall be cause for remedial action by the Bureau of Land Management per 43 CFR 3809.3-2.

The record indicates that, in the past, Bora Bora's mining operations have resulted in discharges of sediments from the mining site, thereby increasing stream turbidity. By letter dated September 30, 1983, the DEQ notified the operator that certain discharges violated State administrative rules due to excessive stream turbidity and that he was discharging wastes without a DEQ permit, in violation of State statutes. Subsequently, on October 21, 1983, DEQ issued a closure order to remain in effect until a permit was obtained. In a letter to BLM dated March 6, 1984, the DEQ reviewed the EA and stated that the mitigating measures designed to control water quality "have merit," but that the operating plans "are inadequate to make a determination if the proposed operation will or will not meet conditions on a

proposed DEQ permit." On April 25, 1984, the DEQ informed BLM that the operator had filed a permit application. The record does not disclose whether a permit has been issued. However, the plan of operations requires a permit prior to resumption of operations.

In their statements of reasons for appeal, challenging the finding of no significant impact, appellants contend that the EA was "incomplete" because it failed to take into account evidence offered by local residents as to "the damage this mine has already done to the environment," and the input from State agencies. In particular, appellants cite the degradation of water quality in Quines Creek caused by Bora Bora's mining operations, which has made the water unsuitable for use in irrigation, human consumption, stock-watering and ponds. In addition, appellants contend that the EA does not support a finding of no significant impact, citing various environmental impacts identified in the EA, including the impact on the fishery habitat due to past mining operations. Appellants argue that the magnitude of future operations, the "irresponsible" attitude of the mining operator, and the continued impact on the environment belie a finding of no significant impact under the proposed mining operation.

[1] The question of whether a proposed action will have a significant environmental impact, based on facts developed in an environmental assessment, is one of the principal bases for determining whether an agency is required to prepare an environmental impact statement (EIS). Section 102 of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332 (1982), requires preparation of an EIS in the case of "major Federal actions significantly affecting the quality of the human environment." See NAACP v. Medical Center, Inc., 584 F.2d 619 (3rd Cir. 1978).

The reasonableness of a finding of no significant impact has been upheld where the agency has identified and considered the environmental problems; identified relevant areas of environmental concern; and made a convincing case that the impact is insignificant, or if there is significant impact, that changes in the project have sufficiently minimized such impact. Como-Falcon Coalition, Inc. v. United States Department of Labor, 465 F. Supp. 850 (D. Minn. 1978), aff'd as modified, 609 F.2d 342 (8th Cir. 1979), cert. denied, 446 U.S. 936 (1980). In such circumstances, we will affirm a finding of no significant impact. John A. Nejedly, 80 IBLA 14 (1984).

In the present case, there is ample evidence that Bora Bora's mining operations, dating from August 1983, have caused excessive turbidity in the Tennessee Gulch and Quines Creek due to sediment runoff, and that this has had a significant adverse impact on the environment, particularly fish populations and habitat, and a direct impact on local residents. Nevertheless, the finding of no significant impact must be viewed in the full context of the EA, which applies to proposed future operations.

The EA identifies certain environmental impacts resulting principally from stream sedimentation, which would be significant if not mitigated. However, the EA also sets forth certain mitigating measures which would control sediment runoff. These measures were then incorporated in the finding of no significant impact and the letter approving Bora Bora's plan of operations. Appellants have provided no evidence that these measures are not adequate to reduce environmental impacts to an insignificant level. Rather, appellants merely assume that the significant impacts which had occurred prior to the

imposition of the mitigating measures will continue under the proposed mining operations.

We note that the DEQ stated in a March 6, 1984, letter that it had not determined whether the proposed operating plan would meet State conditions on a permit, i.e., presumably whether anticipated sediment discharges under these conditions would meet State standards. Nevertheless, we also note that, under the BLM approval letter, the operator is required to comply with State requirements on water quality. Moreover, 43 CFR 3809.2-2(b) requires operators, under an approved plan of operations, to "comply with applicable Federal and State water quality standards."

Appellants have also questioned the willingness of the operator to comply with restrictions on operations designed to prevent sediment discharges. We are not in a position to judge whether past discharges were willful, nor is such a judgment relevant to adjudicating the finding of no significant impact from the contemplated future operations. In any case, we note that BLM is empowered to enforce the provisions of the approved plan of operations, including seeking an injunction of further operations by appropriate court order and damages on the basis of noncompliance. See 43 CFR 3809.3-2.

We conclude, after reviewing the EA, that BLM carefully examined the potential environmental impacts associated with Bora Bora's proposed mining operations along Tennessee Gulch, including a consideration of the concerns of the local residents and the appropriate State agencies. Appellants have identified no relevant areas of environmental concern which were not identified and adequately considered. The record supports a finding that the proposed mining operations, conducted in compliance with the stipulations set forth in the approval letter, will not significantly affect the quality of the human environment. See Friends of the Earth, Inc. v. Butz, 406 F. Supp. 742 (D. Mont. 1975), remanded to be dismissed as moot, 576 F.2d 1377 (9th Cir. 1978).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal of L. E. Mullarkey is dismissed and, with respect to the appeal of the other appellants, the decision appealed from is affirmed.

R. W. Mullen
Administrative Judge

We concur:

C. Randall Grant, Jr.
Administrative Judge

Bruce R. Harris
Administrative Judge.

